BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MANUEL A. RODRIGUEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 268,519
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
CONNECTICUT INDEMNITY COMPANY and	)	
CGU HAWKEYE SECURITY	)	
Insurance Carriers	)	

ORDER

Claimant and respondent and one of its insurance carriers, CGU Hawkeye Security, appealed the May 29, 2002 Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on December 4, 2002. Gary M. Peterson of Topeka, Kansas, was appointed and participated in this appeal as Board Member Pro Tem.

APPEARANCES

Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and Connecticut Indemnity Company (Connecticut). And Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and CGU Hawkeye Security (Hawkeye).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Decision. The record also includes the wage stipulation filed with the Division of Workers Compensation on March 25, 2002.

ISSUES

In the May 29, 2002 Decision, Judge Fuller awarded claimant a 44 percent permanent partial general disability for a July 24, 2001 accident. In determining claimant's

permanent partial general disability, the Judge found that claimant sustained a 32 percent task loss and a 56 percent wage loss. In determining the date of accident, the Judge found that claimant continued to sustain a series of micro-traumas and injury while performing the "leaker boxes" job through July 24, 2001, when claimant last worked for respondent.

The insurance carrier Hawkeye contends Judge Fuller erred by finding a date of accident during its coverage period. Hawkeye argues that claimant sustained a repetitive micro-trauma injury that culminated in June 2000, when claimant was removed from his hamburger packaging job and given light duty. Hawkeye argues that but for a brief return to the hamburger packaging job in late August and early September 2000, claimant's light duty job duties were substantially different from the hamburger packaging job that caused claimant's injuries. Hawkeye argues the date of accident occurred before September 1, 2000, when Hawkeye began providing respondent with workers compensation insurance coverage. Consequently, Hawkeye contends that Connecticut, who insured respondent before Hawkeye, should be held responsible for this claim.

Claimant also contends Judge Fuller erred. Claimant joins Hawkeye's argument that the appropriate date of accident is June 21, 2000. Accordingly, claimant contends the light duty jobs that claimant performed after that date should not be considered in determining claimant's task loss. Moreover, claimant argues that he has sustained a work disability (a permanent partial general disability greater than the functional impairment rating) of either 62 or 81 percent.

Conversely, Connecticut argues there are multiple dates that could be selected as the appropriate date of accident, all of which occur after August 31, 2000, when Connecticut last provided insurance coverage to respondent. Connecticut also argues that claimant has sustained a scheduled injury to the right upper extremity and, therefore, claimant should not be granted a work disability. In the alternative, Connecticut argues that claimant has failed to prove any task loss and that claimant's wage loss is between 36 and 41 percent, which, when averaged with a zero percent task loss, creates a work disability between 18 and 20.5 percent. Nevertheless, Connecticut requests the Board to find Hawkeye responsible for any award entered in this claim.

The only issues before the Board on this appeal are:

1. What is the appropriate date of accident for this claim?

2. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and the parties' arguments, the Board finds and concludes:

Claimant began working for respondent in February 1995. Shortly after claimant began working for respondent, he caught his right hand in a roller, peeling off the skin. After that accident, claimant's job duties changed as he began performing the hamburger packaging job. Claimant found the hamburger packaging job physically demanding as it required claimant to toss 10-pound packages of hamburger into a box. According to claimant, he tossed 60 or 70 packages per minute. When the packaging machine stopped, claimant would cut open the broken packages of hamburger and return the meat to the conveyor line so it could be repackaged.

While performing the hamburger packaging job, claimant began experiencing pain in his hands, wrists, arms, shoulders and low back. In June 2000, claimant reported those symptoms to respondent, who referred him to a company physician. Claimant saw the company doctor on June 29, 2000, and was restricted to light duty.

According to the company's nursing records, claimant saw a different company doctor on August 15, 2000, and was released from treatment without restrictions. Claimant requested a second opinion. But in the meantime, respondent returned claimant to his regular hamburger packaging job where claimant worked until September 5, 2000, when Dr. Pedro A. Murati took him off that job and returned him to light duty. After September 5, 2000, claimant never returned to the hamburger packaging job.

Dr. Murati diagnosed myofascial pain syndrome affecting both shoulders, right wrist strain and low back strain. Only claimant's right shoulder did not improve under Dr. Murati's treatment. Consequently, the doctor requested a surgical consult but claimant declined the surgery that was offered. Therefore, according to the doctor's records, on March 6, 2001, Dr. Murati released him from medical treatment with restrictions.

According to the doctor's records, Dr. Murati restricted claimant from continuous lifting greater than five pounds, frequent lifting greater than 10 pounds and occasional lifting greater than 20 pounds. The doctor also restricted claimant from bending, stooping and reaching above shoulder level more than occasionally and prohibited claimant from constantly pushing and grasping with the right hand. Finally, Dr. Murati restricted claimant from hook and knife work with the right hand and indicated that claimant should be allowed to alternate sitting, standing and walking as necessary.

On July 17, 2001, claimant returned to Dr. Murati at the company's request for a final evaluation and permanent impairment rating. Using the American Medical Ass'n,

Guides to the Evaluation of Permanent Impairment (AMA *Guides*) (4th ed.), the doctor rated claimant as having a five percent whole body functional impairment rating for lumbosacral strain, a one percent whole body functional impairment for loss of range of motion to the lumbar spine, a three percent right upper extremity impairment for crepitus in the right shoulder, and a two percent right upper extremity impairment for instability in the right wrist. Using the *Guides*' Combined Values Chart, the doctor concluded that claimant had a nine percent whole body functional impairment.

Retired orthopedic surgeon Dr. C. Reiff Brown examined claimant on March 5, 2002. The doctor diagnosed biceps rotator cuff tendinitis in the right shoulder and mild residual acromial impingement. Likewise, the doctor believed claimant had symptoms of bilateral carpal tunnel syndrome. Claimant also had back symptoms that the doctor could not explain objectively. Using the *Guides* (4th ed.), the doctor rated claimant as having a five percent functional impairment to the right upper extremity.

According to claimant, on approximately July 24, 2001, respondent laid him off after advising that the company did not have any work for him. When claimant last testified in this claim in March 2002, he remained unemployed although he had been looking for jobs in the Liberal, Kansas, area where he lived.

At the March 6, 2002 regular hearing, claimant introduced into evidence a list of the job contacts that he had made from August 2001 through March 1, 2002. According to that list, claimant contacted 13 potential employers in August 2001, 12 potential employers in September 2001, 18 potential employers in October 2001, 11 potential employers in November 2001, three potential employers in December 2001 (plus he repeated some of his past contacts), 14 potential employers in January 2002, nine potential employers in February 2002 and two potential employers in March 2002.

1. What is the appropriate date of accident for this claim?

The Judge determined that claimant's last day of working for respondent on approximately July 24, 2001, was the appropriate date of accident for claimant's series of micro-traumas and the resulting injury to his right upper extremity and back. In reaching that conclusion, the Judge determined that claimant suffered either an aggravation or new injury while performing the light duty job of turning leaker boxes.

The Board has carefully reviewed and considered claimant's testimony, the notes from respondent's medical department and Dr. Murati's testimony regarding the jobs that claimant performed after June 2000, when he reported his symptoms to respondent's medical department. The Board concludes the greater weight of the evidence establishes that claimant sustained a micro-trauma injury that was caused by the hamburger packaging job, which he last worked from August 15 through September 5, 2000. Further, the Board

concludes that claimant did not sustain permanent injury after that date as he worked light duty jobs until he was eventually terminated in late July 2001.

Following creation of the bright line rule in the 1994 *Berry*[1] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[2] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* focused upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated job.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[3]
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> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[4]

Although both claimant and Dr. Murati were somewhat equivocal in their testimonies about the effects from claimant's light duty jobs following September 5, 2000, the Board finds that the evidence establishes that any increased symptoms that claimant experienced while performing those jobs was caused by the cold environment in which he worked. Based on claimant's testimony, the Board finds the light duty jobs that he performed after first seeing Dr. Murati on September 5, 2000, were physically easier on claimant than his former hamburger packaging job. And based upon Dr. Murati's testimony, claimant improved under the doctor's care and claimant did not sustain any additional permanent injury or permanent impairment after coming under the doctor's care. Consequently, the

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[1] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[2] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[3] *Id.* at Syl. ¶ 3.

[4] *Id.* at Syl. ¶ 4.

Board concludes the last day that claimant worked the hamburger packing job, or on or about September 5, 2000, is the appropriate date of accident for claimant's micro-trauma injury.

2. What is the nature and extent of claimant's injuries and disability?

The Judge awarded claimant benefits for a 44 percent work disability, which was based upon a 32 percent task loss and a 56 percent wage loss. By implication, the Judge determined that claimant permanently injured both his back and right upper extremity while working for respondent. The Judge determined claimant's wage loss by imputing a post-injury wage of $230 per week. Accordingly, also by implication, the Judge found that claimant had failed to make a good faith effort to find appropriate work after he was terminated from respondent's employment.

The Board affirms the Judge's finding that claimant permanently injured both his back and right upper extremity while working for respondent. Accordingly, as claimant has sustained an injury that is not listed in the "scheduled injury" statute,[5] claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute)

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[5] K.S.A. 44-510d.

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

by refusing to attempt to perform an accommodated job, which the employer had offered. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

The Kansas Court of Appeals in *Watson*[9] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[10]

The Board concludes claimant, who completed the sixth grade in Mexico and who has limited skills in reading, writing or speaking English, made a good faith effort to find appropriate employment after his July 24, 2001 termination. The exhibit that claimant introduced at the regular hearing establishes that claimant actively sought employment in the Liberal area following his termination. Accordingly, the Board concludes that claimant's actual wages should be used in the wage loss prong of the permanent partial general disability formula. As claimant was unemployed when he last testified, claimant has sustained a 100 percent wage loss.

Dr. Murati was the only physician to provide a task loss opinion. Dr. Murati reviewed the task loss analyses prepared by both human resources expert Jerry D. Hardin and vocational rehabilitation counselor Karen Crist Terrill. Under Mr. Hardin's analysis and based upon Dr. Murati's restrictions, claimant lost the ability to perform 14 of 18, or approximately 78 percent of the work tasks that he performed in the 15-year period before

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[8] *Id.* at 320.

[9] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[10] *Id.* at Syl. ¶ 4.

the accident. On the other hand, Ms. Terrill utilized Dr. Murati's restrictions and determined that claimant lost the ability to perform seven of 23 former work tasks for a 30 percent task loss. And, according to Ms. Terrill, should the analysis exclude the light jobs that claimant performed for respondent, claimant lost seven of 15 job tasks for a 47 percent task loss.

Dr. Murati agreed with both experts' analyses.

The Board concludes that claimant's task loss falls somewhere between the 30 percent loss based upon Ms. Terrill's task list and the 78 percent loss based upon Mr. Hardin's task list. The Board concludes that 47 percent more accurately quantifies claimant's task loss as that percentage excludes the light duty tasks that claimant performed after he began developing this micro-trauma injury.

Averaging the 100 percent wage loss with the 47 percent task loss yields an approximate 74 percent permanent partial general disability for the period after July 24, 2001. And based upon the parties' stipulation regarding claimant's average weekly wage as of July 24, 2001, claimant's average weekly wage is $455.31 plus $66.37 in additional compensation items for a total of $521.68 for those benefits payable after July 24, 2001.

For the period before July 25, 2001, claimant continued working for respondent and more probably than not earned at least 90 percent of his average weekly wage for a September 5, 2000 accident. Accordingly, claimant's permanent partial general disability for the period before July 25, 2001, is his whole body functional impairment rating, which the Board finds to be nine percent. But those benefits are to be paid based upon an average weekly wage of $513.70.

The Board notes that the record does not disclose an average weekly wage for a September 5, 2000 accident. Accordingly, the Board uses the parties' stipulated average weekly wage for June 29, 2000, or $513.70, as it is relatively close in time to the September 5, 2000 accident date.

AWARD

WHEREFORE, the Board modifies the May 29, 2002 Decision, as follows:

Manuel A. Rodriguez is granted compensation from National Beef Packing Company and CGU Hawkeye Security for a September 5, 2000 accident and resulting disability.

For the period ending July 24, 2001, Mr. Rodriguez is entitled to receive 37.35 weeks of permanent partial general disability benefits at $342.48 per week, or $12,791.63, for a nine percent permanent partial general disability.

For the period commencing July 25, 2001, Mr. Rodriguez is entitled to receive 250.74 weeks of permanent partial general disability benefits at $347.80 per week, or $87,208.37, for a 74 percent permanent partial general disability.

The total award is not to exceed $100,000.

As of July 16, 2003, Mr. Rodriguez is entitled to receive 37.35 weeks of permanent partial general disability compensation at $342.48 per week in the sum of $12,791.63, plus 103.14 weeks of permanent partial general disability compensation at $347.80 per week in the sum of $35,872.09, for a total due and owing of $48,663.72, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $51,336.28 shall be paid at $347.80 per week until paid or until further order of the Director.

The insurance carrier that was on the risk at the time medical treatment was incurred is assessed the cost of that treatment.

The Board adopts the remaining orders set forth in the Decision to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and Connecticut
Kendall R. Cunningham, Attorney for Respondent and Hawkeye
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director